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Tort Law—PENNSYLVANIA ABROGATES GOVERNMENTAL IMMUNITY, BUT REFUSES TO ABOLISH SOVEREIGN IMMUNITY—*Ayala v. Philadelphia Board of Public Education*, ____ Pa. ____, 305 A.2d 877 (1973); *Brown v. Commonwealth*, ____ Pa. ____, 305 A.2d 868 (1973).

The fear of judicial legislation¹ frequently has restrained courts from abrogating the doctrines of sovereign and governmental immunities.² While often denounced as “anachronism[s] without rational basis,”³ and as “obsolete vestige[s] of the distant past,”⁴ the doctrines of governmental and sovereign immunity still remain sacrosanct in a number of jurisdictions. Slightly less than half the jurisdictions have judicially abolished these doctrines.⁵ One of the more recurring reasons for the slow demise of these doctrines is the repeated deference of courts to the legislature in this area,⁶ either because the immunity is supposedly constitutionally mandated⁷ or because the immunity is so entrenched as to be tantamount to public policy.⁸

1. To label a decision “judicial legislation” conjures up grave misapplication of power by the courts. When Colorado abrogated governmental immunity in *Evans v. Board of County Comm’rs*, 174 Colo. 97, 482 P.2d 968 (1971), an intimation of the derogatory connotations of this expression can be extracted from Justice Kelley’s dissent: “What the court has done today is not create ‘judge made’ law; it is judicial legislation which will undoubtedly create consternation, if not more.” *Id.* at 109, 482 P.2d at 974. Similar fears of a court having usurped a legislative prerogative can be found in *Flagiello v. Pennsylvania Hosp.*, 417 Pa. 486, 532, 208 A.2d 193, 216 (1965) (Jones, J. dissenting) (abrogates charitable immunity in Pennsylvania).

2. While the terms sovereign and governmental have been used interchangeably when immunity is discussed, in this study sovereign immunity refers only to that immunity enjoyed by the state and its agencies. Governmental immunity refers to the immunity claimed by local government units such as municipal corporations.

3. *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 216, 359 P.2d 457, 460, 11 Cal. Rptr. 89, 92 (1961).

4. *Biello v. Pennsylvania Liquor Control Bd.*, ____ Pa. ____, 301 A.2d 849, 853 (1973) (Nix, J. dissenting).

5. For a comprehensive list of the status of sovereign and governmental immunities in each state see RESTATEMENT (SECOND) OF TORTS § 895 at 12-21 (Tent. Draft, March 30, 1973).

6. For articles on the comparative ability of courts and legislatures to enact reform in this area see Green, *The Thrust of Tort Law Part II Judicial Law Making*, 64 W. VA. L. REV. 115 (1962); Keeton, *Judicial Law Reform—A Perspective on the Performance of Appellate Courts*, 44 TEXAS L. REV. 1254 (1966); Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265 (1963); Van Alstyne, *Governmental Tort Liability: Judicial Lawmaking in a Statutory Milieu*, 15 STAN. L. REV. 163 (1963).

7. See, e.g., *Krause v. State*, 31 Ohio St. 2d 132, 285 N.E.2d 736 (1972); *Biello v. Pennsylvania Liquor Control Bd.*, ____ Pa. ____, 301 A.2d 849 (1973).

8. Justice Jones, dissenting in *Flagiello v. Pennsylvania Hosp.*, 417 Pa. 486, 208 A.2d 193 (1965), suggests the public policy rationale:

However, although fully cognizant that this doctrine is “judge made” law created by judicial, not legislative, fiat, in my opinion, this doctrine has become part of the public policy of this Commonwealth, a public policy which, if it is to be changed, should be

Historically, the doctrines developed along two lines, one theoretical, and the other pragmatic.⁹ The theoretical justification traces its origin to the maxim, "the king can do no wrong." Courts and commentators have misinterpreted the thrust of this maxim, inferring erroneously from it that the sovereign possesses inherent immunity from wrongdoing.¹⁰ Nevertheless, states seized on the immunity concept; it supplied the rationale for states to avoid liability when public coffers were considerably strained.¹¹

Recently, the Pennsylvania Supreme Court confronted the question of whether the legislature or the judiciary should determine the legal status

effected by legislative action. The abolition of the "charitable immunity" doctrine will affect adversely and seriously *all* charitable institutions throughout the Commonwealth and the impact of such extinction is a matter of grave public concern. Under such circumstances I believe that the legislature and not this Court should act in this area. *Id.* at 532, 208 A.2d at 216.

Coupled with the idea that abrogation will create a serious "impact" on tort law is the proposition that the ramifications of such impact can only be adequately grappled with by the legislature. In *Laughner v. County of Allegheny*, 436 Pa. 572, 261 A.2d 607 (1970), Justice Pomeroy in his dissent delineated three main premises for relegating abrogation to the legislative competence: first, legislative hearings provide a fact-finding process not available to the judiciary; second, the impact and costs of governmental liability require a comprehensive treatment which can be provided only by statute; and third, the complexity of the issue of governmental liability necessitates a thorough yet pragmatic analysis which can only be supplied by the legislature. *Id.* at 583, 261 A.2d at 612.

9. The theoretical argument for immunity appears to be the most difficult for courts to overcome for it involves basic questions such as who is the sovereign, and what is inherent in the nature of sovereignty. The pragmatic considerations supporting immunity are not nearly so lofty; they primarily deal with economic questions such as whether the state or local governmental unit can assume the burdens of tort liability. However, there is an element of the theoretical rationale in the pragmatic argument, for courts assume that states have a choice whether or not to accept responsibility for their actions.

10. Borchard, *Governmental Liability in Tort*, 34 YALE L.J. 1, 2 (1924). Borchard points out that the maxim "merely meant that the King was not privileged to do wrong." *Id.* at n. 2. For a more thorough treatment of the historical development of these doctrines and general background on this topic see 3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 25.01 *et seq.* (1958); 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 29.1 *et seq.* (1956); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 131 *et seq.* (4th ed. 1971); Blachly & Oatman, *Approaches to Governmental Liability in Tort; A Comparative Survey*, 9 LAW & CONTEMP. PROB. 181 (1942); Jaffe, *Suits against Governments and Officers; Sovereign Immunity*, 77 HARV. L. REV. 1 (1963).

11. 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 29.2 at 1609 (1956). These commentators attribute the development of these immunities partially to "the heavy indebtedness of the states and their precarious financial condition during the years immediately after the Revolution." *Id.* at n. 8. Likewise in *Biello v. Pennsylvania Liquor Control Bd.*, ___ Pa. ___, 301 A.2d 849 (1973), Justice Nix in his dissent noted that "[b]y the end of the eighteenth century, the States of this union had accumulated debts resulting from the War of Independence. Most chose to invoke the doctrine of sovereign immunity in order to avoid financial disaster." *Id.* at ___, 301 A.2d at 854. Lack of funds was also the compelling reason for applying immunity to local governmental units in the original English case. *Russell v. Men of Devon*, 2 T.R. 667, 100 Eng. Rep. 359 (K.B. 1788).

of these doctrines. In two four-three decisions,¹² *Brown v. Commonwealth*¹³ and *Ayala v. Philadelphia Board of Public Education*,¹⁴ the court answered this question somewhat differently. In *Brown* the court adhered to the traditional view asserting that abrogation of sovereign immunity is uniquely a legislative function; while in *Ayala* the court, distinguishing governmental from sovereign immunity, ruled that the judiciary could abolish governmental immunity.

It is difficult to differentiate these cases on the facts. In *Brown*, the plaintiff sustained injuries when the National Guard Jeep in which she was a guest passenger, overturned allegedly through the negligence of the driver, a Guardsman.¹⁵ The *Ayala* case involved an accident wherein appellant's arm required amputation after he caught it in a shredding machine in his high school upholstery class. The basic question in both cases was the court's ability to circumvent these immunities.

In *Ayala*, the court summarily rejected the public policy argument,¹⁶ noting that governmental immunity originated in the courts, and therefore

12. The question of abrogation has aroused some very heated debate when courts examine this issue. Sometimes it appears that personality conflicts may arise. See, e.g., *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961), in which Justice Schauer in his dissent felt "impelled to comment that it is unfortunate that a court's reversal of itself on a point of law which it has recently and repeatedly considered should appear to depend upon a change of personnel. A change of court personnel is not, in my concept of judicial duty (under our historic form of government) properly to be regarded as *carte blanche* for the judiciary to effectuate either a constitutional amendment or legislative enactment." *Id.* at ___, 359 P.2d at 464, 11 Cal. Rptr. at 96.

13. ___ Pa. ___, 305 A.2d 868 (1973).

14. ___ Pa. ___, 305 A.2d 877 (1973), *rev'g* 223 Pa. Super. 171, 297 A.2d 495 (1972). When the Superior Court considered this case it vehemently condemned the doctrine of governmental immunity, but felt that "it is for the highest court of the Commonwealth to act to abrogate the inequities of this doctrine. . . ." 223 Pa. Super. at 175, 297 A.2d at 497 (Hoffman, J. concurring).

15. The court rejected appellant's argument that statutorily mandated public liability insurance evidenced a legislative intent to reject sovereign immunity. This is not an unusual interpretation by the Pennsylvania court. Courts have been reluctant to interpret statutorily mandated insurance as a waiver of immunity unless such statute expressly includes such a waiver. 57 AM. JUR. 2d *Municipal, School and State Tort Liability* § 57 (1971). Likewise even when courts are willing to impose liability where insurance exists, certain problems arise. For instance, the Illinois School Code provided that, "Any school district, including any non-high school district, which provides transportation for pupils *may* insure against any loss or liability of such district. . . ." ILL. REV. STAT. ch. 122, § 29-11a (1957) (emphasis added). The court in *Moliter v. Kaneland Community Unit. Dist. No. 302*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959), acknowledged that "[t]he difficulty with this legislative effort to curtail the judicial doctrine is that it allows each school district to determine for itself whether, and to what extent, it will be financially responsible for the wrong inflicted by it." *Id.* at 17, 163 N.E.2d at 92.

16. See note 8 *supra*, where the public policy rationale is developed.

the courts could "dismantle" it.¹⁷ The key issue hindering the Pennsylvania court from likewise rejecting sovereign immunity in *Brown* was its interpretation of a constitutional provision pertaining to suits against the state. As understood by the majority, Article I, section 11 of the Pennsylvania Constitution permits only the legislature to determine in what cases suits may be brought against the Commonwealth.¹⁸ The majority seemed notably displeased with this constitutional constraint, but nevertheless felt that no other construction of this section was permissible.¹⁹ The rationale for the court's strict construction of this section may be gleaned from what the court said in an earlier case wherein it observed that such constitutional provisions are ". . . in derogation of the state's inherent exemption from suit."²⁰ This naturally accepts the state's inherent immunity, an assumption the dissent in *Brown* questions.

The *Brown* dissent disputes the underlying premise of the majority that the "sovereign is the state," an entity apart as it were, from the people.²¹ The superstructure of the majority's argument is supported by an incomplete base. Justice Manderino criticizes the majority for seizing solely on the second sentence of section 11 without any reference to the rest of Article I.²² Thus the majority may have paradoxically engaged in a form

17. ____ Pa. ____, 305 A.2d at 885, *quoting with approval* Flagiello v. Pennsylvania Hosp., 417 Pa. 486, 503, 208 A.2d 193, 202 (1965): "[T]his court fashioned it and what it put together it can dismantle."

18. PA. CONST. art. I, § 11 reads:

All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

19. Citing the last sentence of section 11 of Article I of the Pennsylvania Constitution, the majority in *Brown* insists that "[n]o other conclusion is possible than that it falls to the Legislature to determine the circumstances under which immunity may be waived (Footnote omitted)." ____ Pa. at ____, 305 A.2d at 870. The majority thus concluded "[w]e could not base a contrary holding upon our impatience with the Legislature's failure to act as speedily and comprehensively as we believe it should." *Id.* at ____, 305 A.2d at 871.

20. Biello v. Pennsylvania Liquor Control Bd., ____ Pa. ____, ____, 301 A.2d 849, 851 (1973).

21. In his dissent, Justice Manderino suggests the possible fallacies in the majority opinion: Those decisions [pronouncing the existence of sovereign immunity] have assumed that the *sovereign is the state*, and that the state possesses inherent and inalienable rights—the exact principles of government quillotined and buried in the human revolutions that gave birth to *written constitutions*. ____ Pa. at ____, 305 A.2d at 875.

22. Article I of the Pennsylvania Constitution is entitled the *Declaration of Rights*. Referring to this, Justice Manderino declared; "The complete *Declaration*—its language, tone, and thrust—concerns the protection of the people—not the state." ____ Pa. at ____, 305 A.2d at 875. Furthermore, he concludes that to wrench one sentence from the *Declaration* in order ". . . to protect the rights of the state—not the people—is ludicrous and violates all reasona-

of unintended judicial legislating, while intending a strict construction of the constitution. The dissent suggests that the majority has imputed to the constitution assumptions that are not inherent to it. The majority has presupposed the existence of sovereign immunity and then looked to the constitution for substantiation of its assumptions.²³

At the very least the dissent posits the idea that the constitution is not so confining as the majority's opinion would imply. According to the dissent, Article I, section 11, merely provides a procedural mechanism in which to sue the state.²⁴ It should be noted that such a provision is not unique to the Pennsylvania Constitution.²⁵ However, there is presently a split among the courts concerning the interpretation of such clauses.²⁶ The majority in *Brown* espoused the traditional reading, which construes such provisions as implying immunity.²⁷ Yet, movement can be seen in favor of the dissent's viewpoint, which asserts that immunity should not be read into these clauses.²⁸

While the whole question of sovereign immunity in *Brown* turned on the constitutional limitation, for reasons not fully delineated, this limitation was not a consideration in rejecting governmental immunity in *Ayala*. Governmental immunity was attacked on the grounds that public policy considerations no longer warrant its retention.²⁹ The court followed the

ble principles of construing written language in proper context." *Id.*

23. Justice Manderino states, "... the majority's focus on three words ['in such cases'] requires a second focus of the judicial eyesight, *outside the written constitution* for the discovery of a doctrine known as sovereign immunity originating in the days when authority had to be delegated to people rather than delegated to the state; and when the state was sovereign rather than the people." ____ Pa. at ____, 305 A.2d at 877.

24. Justice Manderino believes that "[t]he reasonable meaning of sentence two, [of section 11], in context, must be that it gives the legislature the right to implement procedurally the substantive rights granted so absolutely in the first sentence of section 11." ____ Pa. at ____, 305 A.2d at 876.

25. IND. CONST. art. IV, § 24: "Provision may be made, by general law, for bringing suit against the State, as to all liabilities originating after the adoption of this Constitution; but no special act authorizing such suit to be brought, or making compensation to any person claiming damages against the State, shall ever be passed." OHIO CONST. art. I, § 16: "All courts shall be open, and every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner as may be provided by law." WISC. CONST. art. IV, § 27: "The Legislature shall direct by law in what manner and in what courts suits may be brought against the state."

26. Compare *Perkins v. State*, 252 Ind. 549, 251 N.E.2d 30 (1969); *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962), with *Krause v. State*, 31 Ohio St. 2d 132, 285 N.E.2d 736 (1972).

27. See *Krause v. State*, 31 Ohio St. 2d 132, 285 N.E.2d 736 (1972).

28. See *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).

29. ____ Pa. at ____, 305 A.2d at 881.

simple philosophy that liability flows from tortious conduct.³⁰ It went on to dismiss fears of excessive litigation as any "justification" for retention of this doctrine.³¹ The court found "equally unpersuasive," the allegation that funds will be diverted from more important interests to pay claims, or that the government lacks funds for such claims.³² Nothing prevents the governmental units from acquiring some type of insurance.³³ Furthermore, by eliminating governmental immunity in toto, courts will no longer have to contend with the bothersome distinctions of governmental versus proprietary functions.³⁴ Rejecting affirmance on the basis of stare decisis, the court remarked that it had overcome this hurdle in other cases, for instance in its abrogation of charitable immunity,³⁵ and parental immunity.³⁶

The question was thus reduced to who should abrogate the admittedly unjust doctrine of governmental immunity, the courts or the legislature? Governmental immunity in *Ayala* was deemed a sole creation of the courts, with at most only a tenuous link to sovereign immunity if at all. In fact, the distinction between these two immunities was suggested in a concurring opinion in *Brown*, rather than in *Ayala* where it would appear more to the point. In *Brown*, Justice Pomeroy commented that the "point of difference" is that in the immunity of local governmental units there is "no constitutional basis" while in cases involving the Commonwealth there is.³⁷ However this reasoning is not consistent with statements made by the Pennsylvania court in other cases.³⁸

30. *Id.* at ___, 305 A.2d at 882.

31. *Id.*

32. *Id.* at ___, 305 A.2d at 883.

33. See note 15 *supra*.

34. Quoting 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 25.07 at 460 (1958), the *Ayala* court concluded that the distinction between governmental and proprietary functions "is probably one of the most unsatisfactory known to the law, for it has caused confusion not only among the various jurisdictions but almost always within each jurisdiction." ___ Pa. at ___, 305 A.2d at 883-84. In dealing with just such a confusing situation, the Virginia Supreme Court recently decided that where governmental and proprietary functions coincide, the governmental function will override. Thus Virginia has actually strengthened governmental immunity. *Taylor v. City of Newport News*, 214 Va. 9, 197 S.E.2d 209 (1973).

35. ___ Pa. at ___, 305 A.2d at 887 quoting *Flagiello v. Pennsylvania Hosp.*, 417 Pa. 486, 208 A.2d 193 (1965). The court said:

Stare decisis is not an iron mold into which every utterance by a Court, regardless of circumstances, parties, economic barometer and sociological climate, must be poured, and, where, like wet concrete, it must acquire an unyielding rigidity which nothing later can change.

36. *Falco v. Pados*, 444 Pa. 372, 282 A.2d 351 (1971).

37. ___ Pa. at ___, 305 A.2d at 872-73.

38. For instance in *Stouffer v. Morrison*, 400 Pa. 497, 162 A.2d 378 (1960), the court determined that the underlying principle of municipal immunity is that "officers performing in a governmental capacity are not the agents or servants of the municipality but of the state itself." *Id.* at 500, 162 A.2d at 380. Similar sentiments regarding the relationship of local

It thus appears that governmental immunity is not as separate a legal concept as *Ayala* might suggest, but that immunity is more a monolithic concept that must be either accepted or rejected completely at both the state and local level. As "creatures of the legislature"³⁹ local governmental units would appear to share in the state's immunity if any exists.

Whether the Pennsylvania court was on solid theoretical ground in overturning governmental immunity may not affect the impact *Ayala* has on subsequent cases. What is significant is that *Ayala* principally examined the traditional arguments sustaining governmental immunity and rejected them. In effect, the foundation was laid for a later case considering sovereign immunity wherein a change of court personnel may readily espouse the dissent's constitutional interpretation and thereby abolish sovereign immunity. Likewise, *Ayala* may prompt the initiation of either of two emerging patterns evident in other states after initial promulgation of apparent sweeping abrogation by the judiciary.⁴⁰ *Ayala*, apart from *Brown*,

governmental immunity to state immunity are found among other states' decisions. See, e.g., *Perkins v. State*, 252 Ind. 549, 556, 251 N.E.2d 30, 34-35 (1969), wherein the court cited *Bernadine v. New York*, 294 N.Y. 361, 62 N.E.2d 604 (1945). The New York Legislature had waived governmental immunity of the State without any reference to subordinate agencies such as municipal corporations. Thus, the New York court, in *Bernadine*, included such instrumentalities in the waiver:

None of the civil divisions of the State—its counties, cities, towns and villages—has any independent sovereignty (citations omitted). The legal irresponsibility heretofore enjoyed by these governmental units was nothing more than an extension of the exemption from liability which the State possessed (citations omitted). 294 N.Y. at 365, 62 N.E.2d at 605.

The *Perkins* court later remarked that "[i]t is of little concern to the injured party whether the injury was caused by a city, county or state. We feel, to be consistent, the common law principle should be applicable to all governmental units alike." 252 Ind. at 558, 251 N.E.2d at 35. Similarly, the Illinois court reasoned: "[S]ince the State is not subject to suit nor liable for the torts or negligence of its agents, likewise a school district, as a governmental agency of the State, is also 'exempted from the obligation to respond in damages, as master, for negligent acts of its servants to the same extent as is the State itself.'" *Moliter v. Kaneland Community Unit Dist. No. 302*, 18 Ill. 2d 11, 16, 163 N.E.2d 89, 91 (1959), citing *Kinnare v. City of Chicago*, 171 Ill. 332, 49 N.E. 536 (1898).

39. Van Alstyne, *Governmental Tort Liability: Judicial Lawmaking in a Statutory Milieu*, 15 STAN. L. REV. 163 (1963). The author develops the relationship of governmental units to the state:

Most governmental entities are simply creatures of the legislature and hence subject to its plenary legislative powers. Even charter cities, which have constitutional home-rule powers with respect to municipal affairs and hence are independent of legislative control in such matters are well within the ambit of legislative control so far as their tort liability is concerned. It is settled law that the conditions and limitations of tort liability are not municipal affairs but questions of statewide concern with respect to which the home-rule powers of charter cities are subordinated to the state statutory control (footnotes omitted). Id. at 228-29.

40. The two patterns can be established from the Colorado experience and the California

may thus be viewed as part of a broader trend in a changing concept of tort law wherein governments recognize their potential as enormous injury-producing agents and co-relatively assume responsibility for these injuries.⁴¹

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experience. In Colorado it appeared that the court had abrogated sovereign immunity in *Colorado Racing Comm'n v. Brush Racing Ass'n*, 136 Colo. 279, 316 P.2d 582 (1957); however, in *Liber v. Flor*, 143 Colo. 205, 353 P.2d 590 (1960), the court limited the intent expressed in *Colorado Racing Comm'n*, and held that a county could not be liable in tort for the negligent conduct of its agents. Such action by the Colorado court gave rise to Justice Frantz's lament which he expressed in a dissenting opinion:

It now appears that what I considered death was only a coma, an apparent death, which the majority have resuscitated to the extent at least that the doctrine is ambulatory in the field of torts. 143 Colo. at 208, 353 P.2d at 602-03.

Finally however, in three companion cases, the court was able to view the problem completely and sweep away both governmental and sovereign immunity. *Evans v. Board of County Comm'rs*, 174 Colo. 97, 482 P.2d 968 (1971); *Flournoy v. School Dist., No. 1*, 174 Colo. 110, 482 P.2d 966 (1971); *Proffitt v. State*, 174 Colo. 113, 482 P.2d 965 (1971).

A different approach developed in California following *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961). Here the legislature enacted statutes relating to sovereign and governmental immunities. CAL. GOV'T CODE § 810 *et seq.* (West 1966). It should also be noted that after all the confusion in Colorado, the legislature eventually passed the Colorado Governmental Immunity Act restoring immunity to a large degree. COLO. REV. STAT. ANN. § 130-11-1 *et seq.* (Supp. 1971). For several thoughtful studies examining the legislative response after judicial abrogation see Van Alstyne, *Governmental Tort Liability: Judicial Lawmaking in a Statutory Milieu*, 15 STAN. L. REV. 163 (1963); Van Alstyne, *Governmental Tort Liability: A Public Policy Prospectus*, 10 U.C.L.A.L. REV. 463 (1963); Comment, *The Colorado Governmental Immunity Act: A Judicial Challenge and the Legislative Response*, 43 COLO. L. REV. 449 (1972).

41. Considering the recent publicity surrounding the paucity of safety features in school buses, it is quite ironic that in many states injured students may have no recourse against the government. Thus a case such as *Ayala* may demonstrate the maxim, "[w]hat's good for the plaintiff is good for tort law."



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